

EXHIBIT A

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Civil Case No. 08-5169

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IN RE URETHANE ANTITRUST : - TRIAL PROCEEDINGS -
LITIGATION : (rough draft)
- - - - -x

Newark, New Jersey
March 16, 2016

B E F O R E:

THE HONORABLE WILLIAM J. MARTINI,
UNITED STATES DISTRICT JUDGE,
And a Jury

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1 March 16, 2016

2 (Trial resumes - Jury not present.)

3 Clerk all rise.

4 THE COURT: Be seated, please.

5 Good morning.

6 MR. JOHNSON: Good morning. Good morning.

7 THE COURT: We're all set?

8 Okay.

9 MR. JOHNSON: Yes.

10 THE COURT: Let's bring out the jury then.

11 THE DEPUTY CLERK: Please rise for the Jury.

12 (Jury present.)

13 THE COURT: Good morning; good morning. Please be

14 seated.

15 All right. Mr. Johnson, are you ready to proceed?

16 MR. JOHNSON: Yes, I am, your Honor. Thank you very

17 much.

18 We're going to start off by completing Mr. Dhanis.

19 (The videotaped deposition of Jean-Pierre Dhanis

20 resumes being played in open court.)

21 (The playing of the videotaped deposition is stopped.)

22 MR. JOHNSON: That completes Mr. Dhanis -- I'm sorry,

23 I'm wrong. Another volume, a little bit more.

24 (A videotaped deposition of Jean-Pierre Dhanis is

25 played in open court.)

1 (The playing of the videotaped deposition is stopped.)

2 MR. JOHNSON: Now we're done, your Honor.

3 THE COURT: Okay.

4 MR. JOHNSON: I'm going to hand out a list of the
5 exhibits that were admitted into evidence during the
6 examination. This has already been given to defense counsel.

7 THE COURT: If there's no objection to the list --
8 you've seen the list?

9 MR. STREETER: No objection.

10 THE COURT: Hand them up. They're in evidence.

11 MR. JOHNSON: Thank you.

12 (Various exhibits are received in evidence.)

13 THE COURT: Your next witness?

14 MR. JOHNSON: Plaintiffs call Robert Kirk. Mr. Kirk
15 was deposed on September 30th and October 1st, 2009.

16 (Above described videotaped deposition is played in
17 open court.)

18 (The playing of the videotaped deposition is stopped.)

19 MR. JOHNSON: Just moving to the next volume, your
20 Honor.

21 (A further videotaped deposition is played in open
22 court.)

23 (The playing of the videotaped deposition is stopped.)

24 MR. JOHNSON: That completes Robert Kirk, your Honor.

25 THE COURT: Continue.

1 MR. JOHNSON: Do you want me to continue?

2 THE COURT: Yes, I do.

3 MR. JOHNSON: At this time, plaintiffs call Michelle
4 Blumberg by video deposition. Her deposition was taken July
5 21, 2010.

6 THE COURT: Thank you.

7 MR. JOHNSON: Oh, before we start that, I was just
8 reminded to hand up the exhibits. There aren't too many --

9 THE COURT: Are they on a sheet of paper?

10 MR. JOHNSON: They are.

11 THE COURT: Hand them to counsel. If there's no
12 objection, just hand them up, that's all.

13 MR. JOHNSON: Yes. You just want me to hand them up?
14 Okay.

15 THE COURT: Just hand them up. They've seen them and
16 they have no objection, they'll be in the record.

17 MR. JOHNSON: Thank you, your Honor.

18 (A document is handed up to the Deputy Clerk by Mr.
19 Johnson.)

20 (Above described videotaped deposition is played in
21 open court.)

22 THE COURT: Counsel, why don't we stop here?

23 (The playing of the videotaped deposition is stopped.)

24 THE COURT: Okay. We'll take a morning break, ladies
25 and gentlemen. Please don't discuss anything about the case

1 and we'll see you back here in about 15 minutes. Okay?

2 Thanks very much.

3 THE DEPUTY CLERK: Please rise for the Jury.

4 (The Jury leaves the courtroom.)

5 THE COURT: Be seated.

6 I want to deal with the issue regarding Dr. Marx's
7 testimony.

8 So, I received your submissions on that issue. I
9 don't know if I need any further real comment. I'll hear you
10 briefly if you want to just add anything.

11 I know, Mr. Bernick, your client is trying to keep her
12 testimony out; or alternatively, limit it.

13 And you're opposed to that, of course. Correct, Mr.
14 Johnson?

15 MR. JOHNSON: Yes, your Honor.

16 THE COURT: Okay. All right. And the theory being
17 that there's a variance from what was put forth initially in
18 terms of the amount of damages being 616 million, and
19 apparently there's been some recomputation by Dr. Raiff, and
20 you've stated in your opening that the damages were 581
21 million. Correct?

22 MR. JOHNSON: Yes, your Honor.

23 THE COURT: Okay. I think this is a matter that --
24 well, Dr. Marx, of course, will be permitted to testify. But I
25 think she's going to have to stick to the original opinion as

1 to what the amount of damages were. That was based on the
2 facts and the data that was provided to her by Dr. Raiff,
3 that's what's in her expert opinion. If there's any variance,
4 which apparently there is, counsel of course will have a chance
5 to cross-examine her on the variance and the reasons for it and
6 the underlying recomputation if there is one, if he chooses to
7 do that cross-examination. So she will be permitted to
8 testify.

9 As far as the issue of attributing the variances to
10 the existence of a conspiracy, I'm satisfied she'll be able to
11 make that opinion as well. However, she will not be able to
12 attribute any variances to a specific price increase amount on
13 a specific date.

14 So she'll be able to, you know, opine as to the
15 overall variance being due to the existence of a conspiracy,
16 but she can not opine as to a particular date that that was
17 a -- the reason for that was for a conspiracy.

18 Okay. So I wanted to get that ruling so we have the
19 benefit of that.

20 Go ahead, Mr. Bernick.

21 MR. BERNICK: Yes, just a clarification. The
22 attribution to a specific price increase, we understand
23 clearly, we had asked -- and I think it's based on the same
24 admission that perhaps your Honor is relying upon -- where she
25 says, it's not attributable to any specific conduct; that is,

1 conspiratorial conduct. And that's very, very important,
2 because she didn't do that analysis.

3 So is your Honor limiting it to the price increase
4 announcements or the conduct associated with the price increase
5 announcements? I mean, that's pretty -- that's pretty
6 important. The admission is specific conduct.

7 THE COURT: Mr. Johnson.

8 MR. JOHNSON: I'll let Mr. Martin address this.

9 THE COURT: Go ahead.

10 MR. MARTIN: I'm not entirely clear what he means by
11 "specific conduct."

12 She said that she evaluated -- she was asked to
13 evaluate whether the conspiracy had an affect on prices. She
14 did do an analysis to determine whether or not the results of
15 her model are reasonable in light of the evidence. She did
16 look at the evidence. She would not say, I don't believe, and
17 she didn't say in her testimony: This particular event, the
18 Swan meeting, if that's conduct, I can attribute to this
19 variance.

20 THE COURT: All right.

21 MR. MARTIN: I understand -- I would put that in the
22 same category, specific conduct, specific instances of conduct
23 in furtherance of the conspiracy.

24 THE COURT: She's not going to testify to that, to the
25 specific --

1 MR. MARTIN: No, no. And that's -- I want to make
2 sure that that's the line we're drawing. And if that's it,
3 that's fine.

4 MR. BERNICK: That's exactly right. I mean, what she
5 says is the evidence of the conspiracy as a whole, without
6 specificity. And that we understand is fine. It's when you
7 get into her opining with respect to conspiratorial conduct
8 specifically, that that crosses the line.

9 I'm assuming from Mr. Martin's comment that --

10 THE COURT: And I don't think she will be.
11 Right?

12 MR. MARTIN: I mean, she's not going to tie it -- if
13 she's asked: Did you look at the actual historic facts?

14 Yes, she did. And then that's all in the report. And
15 I think that she should be allowed to testify to that.

16 THE COURT: I think so too.

17 MR. BERNICK: But not the specific facts.

18 THE COURT: Well, if that comes up, object if it comes
19 to that point. I don't think it will. I think he's
20 representing she's not going to opine in that way.

21 Correct?

22 MR. MARTIN: I certainly understand the ground rules
23 on direct.

24 THE COURT: Okay.

25 MR. MARTIN: Can I ask one clarification though on the

1 damages number?

2 She will come in and she'll offer the same six,
3 whatever it was, 616, six whatever --

4 THE COURT: That's what her model and that's what her
5 computation was.

6 MR. MARTIN: Will we be allowed to say: Counsel has
7 asked you to subtract for legal reasons X amount of damages,
8 and that's why the number is 582?

9 Because I think that would be the way to do it.
10 Because really that's all we've asked her to do. We didn't ask
11 her to change the model. We just said, at the back end we're
12 not going to ask for damages that we think are rightfully
13 collectible for legal reasons.

14 MR. BERNICK: If the question is -- and let's talk
15 about this with the Court -- if the question is, will she be
16 able to say that she got to the 582 by subtraction; that is,
17 that that's what the number that's being offered is, I think
18 that that really does run contrary to what your Honor has just
19 said, that she should be testifying to the same model. If
20 counsel wants to make a representation, that's fine. But she
21 should be testifying to the same model on the basis of the same
22 facts. And if they want to make a representation to the Court
23 that they're not asked -- that they made an adjustment, they
24 can. But that's really counsel's undertaking, it's not her
25 opinion. That's the basic problem.

1 The basic problem is that there's this number, and as
2 soon as she starts to talk about it, you get into this whole
3 world of whether you can make that subtraction as a modeling
4 matter, which is highly controversial --

5 ***** THE COURT: You'll have a chance to cross-examine her
6 on that.

7 MR. BERNICK: I'm not going to bring out the 581.
8 Your Honor has said that it's the original model, the original
9 numbers. I will cross-examine her with respect to that. But
10 if this is just a question of her saying: Well, counsel
11 instructed me to make the adjustment, and I did it, that then
12 opens the whole door to whether it's proper to make the
13 adjustment as a matter of modeling. I haven't even deposed her
14 on that. That's the problem.

15 They can make the adjustment as lawyers, but she can't
16 justify or explain the reduction because that's a whole new --

17 THE COURT: Let me think about that. But I mean, if
18 you're going to ask her: Have they asked you -- and then
19 you'll cross-examine her that she couldn't get to that number
20 in your opinion, I assume.

21 MR. BERNICK: That is the whole problem, your Honor.
22 The adjustment that's been made is a subtraction. To show the
23 problems with the subtraction is a very technical modeling
24 problem. And we set it out in our papers. You have to get
25 into whether the model can really support that or not support

1 that.

2 THE COURT: So you'd rather have the higher damage
3 number?

4 MR. BERNICK: I'd rather have the higher damage
5 number, absolutely.

6 MR. MARTIN: And, your Honor, I'm just trying to know
7 how we tell the jury that the lawyers made a decision. If we
8 don't want to do it through Dr. Marx, maybe counsel can stand
9 up and say we decided to drop the amount of claims. I'm just
10 trying to make it that simple.

11 MR. BERNICK: There's no evidence to support it.

12 MR. MARTIN: There's no evidence to support that we
13 decided not to pursue a meritorious claim. I don't know that
14 there is evidence to that. That's a lawyer-decision to make
15 this case easier.

16 MR. BERNICK: That's their decision. I just don't
17 want to hear it from Dr. Marx.

18 MR. MARTIN: Dr. Marx will say: I did the model. I
19 believe in the model. I believe in the results.

20 THE COURT: We'll see. I'm reserve on that.

21 MR. MARTIN: Thank you.

22 MR. BERNICK: They cannot bring out the lower figure
23 through her. Is that your Honor's ruling?

24 THE COURT: That's your position. I'll see.

25 MR. JOHNSON: Thank you, your Honor.

1 THE COURT: I'll see. Because if they choose to try
2 to bring it out through her, then you'll have a chance to
3 attack that opinion as not being substantiated by the --

4 MR. BERNICK: Then we would like to take her
5 deposition over the weekend.

6 THE COURT: You're not taking her deposition.

7 MR. BERNICK: Your Honor, there are --

8 THE COURT: You're not taking her deposition.

9 MR. BERNICK: Your Honor, there's no other way. I
10 don't know how I can conduct cross-examination with respect to
11 an opinion that she never expressed by the time --

12 THE COURT: Exactly how you're talking to me right
13 now, that's how you do it. You challenge her credibility for
14 getting to that number. And she'll say: Well, I was asked to
15 do that by the lawyer.

16 I'm not sure the lawyers are wise to want to do it
17 either, but go ahead, it's your case.

18 That's how you do it. That's how you're do it.
19 You're not getting a deposition.

20 I'll see you in 15 minutes.

21 MR. JOHNSON: Thank you, your Honor.

22 (A recess is taken.)

23 (Proceedings resume - Jury not present.)

24 THE COURT: Let's round up everybody, please.

25 Counsel, I'm going the reserve on this issue, okay,

1 significantly before she testifies. Okay? On that last issue.

2 MR. BERNICK: Yes.

3 THE COURT: But there's no deposition.

4 MR. BERNICK: I expected --

5 THE COURT: No.

6 THE DEPUTY CLERK: Are you ready, Judge?

7 THE COURT: Yes.

8 THE DEPUTY CLERK: Please rise for the Jury.

9 (Jury present.)

10 THE COURT: Be seated. Thank you.

11 All right, Mr. Johnson.

12 MR. JOHNSON: Thank you.

13 Continuing with Ms. Blumberg.

14 THE COURT: Okay.

15 (The videotaped deposition of Ms. Blumberg resumes
16 being played in open court.)

17 (The playing of the videotaped deposition is stopped.)

18 MR. JOHNSON: Your Honor, that concludes Ms. Blumberg.

19 And I'll hand up now the plaintiffs' exhibits which were
20 entered into evidence during her testimony, and I believe
21 there's no objection.

22 THE COURT: They are the exhibits on the list,
23 counsel?

24 MR. BERNICK: No objection.

25 THE COURT: They're in evidence. Go ahead.

1 (A document is handed up to the Deputy Clerk by Mr.
2 Johnson.)

3 MR. JOHNSON: Plaintiffs now call Gerald Phelan by
4 videotape. His deposition was taken on 10/15/2009.

5 MR. JOHNSON: Just for your information purposes, it's
6 47 minutes long.

7 THE COURT: Thank you.

8 (Above described videotaped deposition is played in
9 open court.)

10 (The playing of the videotaped deposition is stopped.)

11 MR. JOHNSON: Your Honor, that concludes the
12 deposition of Mr. Phelan and once again we'll hand up the
13 exhibit list.

14 THE COURT: There's no objection to the exhibits?

15 MR. STREETER: No objection.

16 THE COURT: They're received in evidence.

17 (Various documents are received in evidence.)

18 THE COURT: All right. The next witness.

19 MR. JOHNSON: The next witness is Marco Levi. His
20 deposition was taken over a three-day period: In May 19th,
21 220th and 21st in the year 2010. It's a bit longer, three
22 hours and 39 minutes.

23 THE COURT: Okay.

24 (Above described videotaped deposition is played in
25 open court.)

1 THE COURT: Could we break we break here?

2 (The playing of the videotaped deposition is stopped.)

3 THE COURT: We'll break here for a moment. We'll take
4 another break and see you back here in about 15 minutes.

5 Please don't discuss anything about the case.

6 Thanks very much.

7 By the way, before you recess, we are not going to sit
8 this Friday and we're not going to be sitting next Friday which
9 is the beginning of the holiday weekend, next Friday the 25th.
10 But other than that we'll be sitting tomorrow and the rest of
11 the days next week.

12 Okay. Thanks.

13 THE DEPUTY CLERK: Please rise for the Jury.

14 (The Jury leaves the courtroom.)

15 MR. BERNICK: I want to say I apologize for my phone
16 buzzing, your Honor. It just went off.

17 THE COURT: It happens. It happens to me even, so
18 it's happened.

19 Anything?

20 MR. JOHNSON: Yes, your Honor, if you have a moment,
21 just a couple of things with respect to Mr. Underdown who is
22 going to testify tomorrow.

23 THE COURT: Who is that?

24 MR. JOHNSON: Mr. Underdown from Hickory Springs.
25 There's going to be a live witness again.

1 THE COURT: He's one of the customers. Right?

2 MR. JOHNSON: Yes.

3 THE COURT: All right.

4 MR. JOHNSON: So we're going to bring him in at the
5 start of the day, and wherever we are here we'll just stop and
6 pick it up later like we did with Mr. Wood.

7 THE COURT: Okay.

8 MR. JOHNSON: And the other thing was, we had intended
9 to show as a demonstrative a very short video, it's eight
10 minutes long, that was filmed of Hickory Springs personnel at
11 Mr. Underdown's request recently, and it's intended to be used
12 as a demonstrative to assist the jury to understand how they
13 used these products, TDI and polyols from Dow and its
14 competitors. It's showing activity of one of their plants --

15 THE COURT: This is through that witness?

16 MR. JOHNSON: Yes.

17 THE COURT: Tomorrow?

18 MR. JOHNSON: That witness. It only a demonstrative
19 and it doesn't have sound.

20 THE COURT: Have you seen it, Mr. Bernick?

21 MR. BERNICK: Yes, we have.

22 THE COURT: Do you have an objection to it?

23 MR. BERNICK: We just don't see the relevance of it.
24 It's kind of: Here's a family business --

25 THE COURT: It depends on how long it is too.

1 MR. BERNICK: It's nine minutes.

2 MR. JOHNSON: It's eight minutes. It's just
3 background, your Honor.

4 THE COURT: There's a lot of background.

5 MR. JOHNSON: Yes, there is.

6 THE COURT: There's a lot of background. Okay.

7 MR. JOHNSON: It's only a demonstrative, your Honor.
8 It's not going to be moved into evidence.

9 THE COURT: Okay. It just shows his plant --

10 MR. JOHNSON: Yes, how they make this stuff. I think
11 it actually will be of some interest to the jury.

12 MR. BERNICK: That's exactly the point. It's not just
13 background, it's basically: Here we are with our workers and
14 we're a hard working, you know, basic manufacturing company in
15 contrast to the big Dow Chemical Company. That's the only real
16 purpose for it. Everybody knows that you take the stuff --

17 MR. JOHNSON: We --

18 MR. BERNICK: Excuse me. That you take the stuff that
19 comes from Dow and you put it into a mold --

20 THE COURT: Before you show the demonstrative, let's
21 hear his testimony. He's going to get into some of that.
22 Right?

23 MR. JOHNSON: Yeah, and he wants to simply -- there's
24 no sound on this. This is not a slick production.

25 MR. BERNICK: That's the whole point.

1 MR. JOHNSON: He's going to simply say: This is our
2 plant, here are the train cars coming in with the chemicals,
3 this is what happens to the chemicals and this is the foam that
4 results. There's no, you know, bunch of workers shown or
5 anything like that.

6 THE COURT: I'll reserve. Let me see. I'll think
7 about it.

8 MR. JOHNSON: Would you like us to send it to you,
9 your Honor?

10 THE COURT: Let me see.

11 MR. BERNICK: So actually we have a summary issue for
12 tomorrow. And we are going to provide a package, we've already
13 given the summary and the basis for the summary to counsel, it
14 comes from a deposition, and we would like to submit a package
15 to your Honor as well. These are -- they're a little bit
16 different from the other summaries because they're based upon a
17 summary of the underlying data --

18 THE COURT: Okay. You want to use this on
19 cross-examination?

20 MR. BERNICK: Absolutely. It was from Mr. Underdown
21 in particular, used in his deposition. The underlying
22 materials were used in his deposition. And so we're happy to
23 create the foundation before the jury. Frankly, I'd like to
24 avoid the kind of dialogue that we had the other day. It's
25 going to come in or it's not going to come in. We think it's

1 very simple, but we want to provide that to your Honor and the
2 other side in advance so that --

3 THE COURT: Are you objecting to it?

4 MR. JOHNSON: We had an objection to all of these
5 exhibits, your Honor, from the beginning. This morning Mr.
6 Bernick came to me and said not only did he wish to use the
7 exhibits as to which we had objected, but that he intended to
8 create a graphic summary in some fashion of the information
9 contained on these objected-to exhibits. So we told him that
10 we objected to that and told him the reasons why, and so that's
11 where it stands. And this literally happened this morning.

12 MR. BERNICK: It's actually again not entirely
13 accurate. But rather than going back through the history of
14 what happened, these are exhibits in his deposition, they were
15 stipulated to by Mr. Leveridge, counsel for the plaintiffs
16 here, as being an accurate reflection of Dr. Raiff's data.
17 They were used to examine the witness, Mr. Underdown. He
18 talked about it, he gave sworn testimony on the basis of
19 questions that were posed concerning that data. All we have
20 done -- so they've objected to a document that they stipulated
21 to.

22 We then took -- all we did is we plotted the points so
23 the jury can see the trend instead of paging through 20 pages
24 of numbers. This is all about being able to present the
25 purchase history for Hickory Springs.

1 I'll add, your Honor, there is no other data that we
2 are aware of that spans this whole period of time and shows
3 what these people actually bought, how much they paid other
4 than the data that Dr. Raiff has gathered. There's no other
5 source of all of the this data. This jury has heard about 10
6 years of prices and they have no way to see what actually
7 happened to those prices other than the data that was used by
8 their expert and will be the basis for her testimony.

9 THE COURT: All right. I've listened. Go ahead.

10 MR. JOHNSON: The problem, your Honor, is not that the
11 data isn't Dr. Raiff's data, the problem is, they're trying to
12 use that data improperly to say that that's the prices that
13 Hickory Springs paid. And, in fact, it's not.

14 MR. BERNICK: That --

15 MR. JOHNSON: Because there are other components. The
16 data that Dr. Raiff used was used in a particular way in the
17 context of the model. It does not, in fact, reflect the bottom
18 line prices paid by Hickory Springs, and that's why we objected
19 to the exhibits. And I learned today that they have a summary
20 of that and that's why we objected to it.

21 THE COURT: All right. Let's take a break. I've
22 heard it. If I have to hear more, I will. We'll take a break.

23 Come back in 15 minutes.

24 Gail, you're including this time. Right?

25 THE DEPUTY CLERK: Yes.

1 THE COURT: Because otherwise we will never get
2 through. Okay.

3 (A recess is taken.)

4 (Proceedings resume - Jury not present.)

5 THE DEPUTY CLERK: Remain seated.

6 THE COURT: Okay. Bring out the jury.

7 THE DEPUTY CLERK: Please rise for the Jury.

8 (Jury present.)

9 THE COURT: Be seated. Thank you. Sorry.

10 All right. You can proceed, Mr. Johnson.

11 MR. JOHNSON: Thank you, your Honor.

12 Proceeding with Mr. Levi. I wish he could keep his
13 voice up.

14 (The videotaped deposition of Mr. Levi resumes being
15 played in open court.)

16 (The playing of the videotaped deposition is stopped.)

17 MR. JOHNSON: Just switching volumes, your Honor.

18 THE COURT: Okay.

19 (A videotaped deposition is played in open court.)

20 (Playing of the videotaped deposition is stopped.)

21 THE COURT: I'm going to stop here for the day because
22 we have a few things we have to take care of, the lawyers.

23 Ladies and gentlemen, thanks. We'll see you tomorrow
24 at 9 o'clock and we'll probably be here until 4:00, 4:30
25 tomorrow. Okay?

1 Please don't discuss anything about the case and have
2 a safe ride home. Thank you.

3 THE CLERK: Please rise for the Jury.

4 (The Jury leaves the courtroom.)

5 THE COURT: Okay. Be seated, everyone all right,
6 I had the benefit of taking a look at some of the
7 proposed summaries, Mr. Bernick. When did you provide those to
8 counsel?

9 MR. BERNICK: The underlying documents go back. So
10 the charts themselves I think we circulated -- Will is not here
11 but I think we circulated --

12 THE COURT: When did you get them, Mr. Johnson, do you
13 recall.

14 MR. JOHNSON: This morning.

15 THE COURT: We got them this morning.

16 MR. BERNICK: That's not the first --

17 MR. JOHNSON: This morning. In fact, he came in and
18 told me they would be sent to me via emails, and I received it
19 while court had already started.

20 MR. BERNICK: I don't think that's accurate. I think
21 we sent them yesterday or even the day before, but we sent a
22 new package this morning. The only thing that's new in that
23 package is the charts themselves. The announcements are the
24 stipulated announcements, and the price lines are simply plots
25 of the data from -- literally you take the numbers right off --

1 THE COURT: I heard you before.

2 MR. BERNICK: I'm sorry.

3 THE COURT: You keep saying -- it's the data that Dr.
4 Raiff used. Right?

5 MR. BERNICK: That is the source of it, but in this
6 case it's different from the other summaries. It's the data
7 literally that are in the deposition exhibits. In other words,
8 if you read --

9 THE COURT: Why -- go ahead, Mr. Johnson, let me hear
10 from you.

11 MR. JOHNSON: I don't understand what he's quibbling
12 about. He gave me the charts. I'm not talking about -- we
13 already had --

14 THE COURT: I know you had the underlying documents.
15 I don't think you're disputing -- wait.

16 MR. JOHNSON: No, and objected to those.

17 THE COURT: Okay.

18 MR. JOHNSON: So the charts we just got literally as
19 we were starting court today. Of course I immediately passed
20 it along to the appropriate people to take a look at and see
21 what the problems were, if any, with it, and they got back to
22 me and said there were problems.

23 And Mr. Leveridge, who is dealing with the testimony
24 for tomorrow, wrote right back to Will and said, we have
25 problems with this stuff, and here are the problems, sent him a

1 long email on this. And then of course Mr. Bernick raised the
2 issue with you, and apparently was prepared to hand you a bunch
3 of stuff this morning to set forth his position.

4 We, of course, have not had an opportunity to tell you
5 what our position is, which makes it difficult. But those are
6 the facts, your Honor.

7 MR. BERNICK: Your Honor, we have tried any way we can
8 to get summaries in, and on the basis of the success with which
9 the plaintiffs have met in connection with this particular
10 witness, we realized that the deposition exhibits that have
11 been used with this witness had Raiff data themselves. And you
12 can compare the Raiff data in these exhibits with the Raiff
13 data in our prior charts that we sent to them weeks ago, and
14 I'm happy to address the issues that --

15 THE COURT: No, no, no.

16 MR. BERNICK: I'm sorry, your Honor, I keep on going
17 on, but --

18 THE COURT: The pertinent question right now is: How
19 long have you known that the plaintiffs were going to call this
20 witness tomorrow?

21 MR. BERNICK: We've known for quite some time.

22 THE COURT: Right. And why is it that you didn't
23 provide these summaries two weeks ago?

24 MR. BERNICK: For the very reason --

25 THE COURT: Why am I getting them the day you're

1 asking me to get a ruling?

2 MR. BERNICK: Because we have tried many different
3 ways to get these summaries in, and we realized when we -- your
4 Honor, if I could just finish.

5 THE COURT: I'm listening, I'm listening.

6 MR. BERNICK: We realized when we were going through
7 Mr. Underdown's deposition to prepare for taking his testimony
8 tomorrow that these underlying documents had been used. And he
9 had testified about them in his deposition. And it was very
10 simple: We said, we can bypass all of the other issues because
11 there was an agreement by Mr. Leveridge that said that the
12 documents could be used in the deposition, and they were.

13 We said, this is a simple way --

14 THE COURT: You didn't answer my question. Why didn't
15 you provide these -- why didn't you make these charts up two
16 weeks ago?

17 MR. BERNICK: I just told you, your Honor. With due
18 respect, I said, I was reading the deposition of Mr. Underdown.
19 I saw the underlying summaries of Mr. Underdown's deposition.

20 THE COURT: I'm sorry, Mr. Bernick, but, you know,
21 that's your answer. You didn't realize it until recently is
22 what you're saying. That's what you're saying. You didn't
23 realize it and then you decided to try to make summaries, which
24 you did and we got them this morning. I got them this morning.

25 MR. BERNICK: To be clear, the summaries are the

1 underlying documents --

2 THE COURT: I've heard you three times now on that.
3 I've heard you.

4 MR. BERNICK: Okay.

5 THE COURT: I've heard that they are based on
6 documents that were used in the deposition.

7 MR. BERNICK: Yes.

8 THE COURT: The summaries weren't used in the
9 deposition obviously.

10 MR. BERNICK: The charts were not, yes.

11 THE COURT: Okay. And your affidavit of Marissa Ginn
12 is dated March 16th, 2016. That's today.

13 MR. BERNICK: That's correct.

14 THE COURT: Yeah. Okay.

15 Mr. Johnson, what else do you have on this?

16 MR. JOHNSON: Really not much, other than as I said,
17 Mr. Leveridge did respond immediately as to all the reasons why
18 we thought it was inappropriate to them. We've had no response
19 from them other than they submitted a bunch of stuff to you
20 which he gave me a copy of. And I'm going to take this back
21 tonight to Mr. Leveridge and the people that are dealing with
22 these issues. But I think it's untimely, your Honor. And
23 I'm -- you know, I just -- I can't imagine that they were not
24 preparing for this cross-examination weeks and weeks ago. This
25 guy has been on our live witness list for months.

1 THE COURT: I understand.

2 MR. JOHNSON: That's all.

3 THE COURT: He acknowledged he's anticipated he was
4 going to be called as a witness.

5 These two documents that you handed up, Mr. Bernick,
6 with the proposed summary -- three actually I guess -- they
7 were Defendants Exhibits 2819, 2818 and 2820, are these the
8 documents that were used in the deposition?

9 MR. BERNICK: Yes, they are, and they've listed as
10 exhibits and they were objected to.

11 THE COURT: Okay. And they were objected to at the
12 time of the pretrial conference?

13 MR. BERNICK: That's correct.

14 THE COURT: Is that right, Mr. Johnson?

15 MR. JOHNSON: Yes.

16 THE COURT: What was your objection to the underlying
17 exhibits?

18 MR. JOHNSON: We had a lot of objections. This is --
19 the problem with the data is the data was used for purposes of
20 model creation. It does not actually reflect the actual prices
21 that were paid by Hickory Springs because there is another step
22 within the model process that deals with rebates and signing
23 bonuses and the like. Furthermore, the data deals with just
24 one type of polyol and not the many types of polyol that
25 Hickory Springs would have bought during this period. So --

1 THE COURT: What I'm reading here is, it says, TDI,
2 MDI and polyols.

3 MR. JOHNSON: Yes, it's all three. I should have said
4 all three products.

5 THE COURT: Okay. And so those are some of the
6 problems with the data. And as I said, there was a detailed
7 answer given by Mr. Leveridge in an email this morning which
8 frankly, your Honor, I'm not as on top of as he is and the
9 experts.

10 THE COURT: I'll hear from him in the morning.

11 MR. JOHNSON: So I don't want to step out too far on
12 the ledge.

13 THE COURT: I'll hear from him in the morning.

14 MR. BERNICK: Your Honor, if I could be heard?

15 THE COURT: Yes, sure.

16 MR. BERNICK: The summaries -- and this is the reason
17 that we submitted the transcripts -- the summaries were marked
18 at the deposition, used in the deposition. Mr. Leveridge made
19 the same statement in the deposition. And then my predecessor
20 Mr. Loeb, took Mr. Underdown's deposition -- we gave you
21 samples for hours -- and those exhibits were used to question
22 the witness without objection, without objection. That's why
23 we sent the transcript through.

24 And the reason it was without objection is that this
25 is the best available information that talks about the price

1 trends. And page after page Mr. Loeb went through the
2 examination using these documents, because that's exactly what
3 they were done for. And there's not a single objection to
4 those questions based upon the fact that the data is
5 inaccurate.

6 Now, I could go into the model. This is the same data
7 that drives the model. It is the only data in this case that
8 deals with prices on a comprehensive basis except our expert.
9 Our expert has charts too.

10 We took their expert's data with respect to all these
11 prices, thousands and thousands and thousands of prices in
12 order to reduce the ability -- reduce the issues about putting
13 before the jury the most important information in the case.
14 They will object. They've objected to this whole effort, they
15 won't let our experts do it. Their own witness doesn't go --
16 Dr. Marx has never done this analysis.

17 So there is -- if this doesn't come in, there will be
18 no data before this jury on a consistent basis regarding the
19 prices, and it comes right from their expert's database. And
20 these summaries, the witness is going to sit there and go
21 through in front of the jury: Will you look at this? Will you
22 look at this, comparing prices point-by-point-by-point on this
23 document. It's the only document that's there. That's what he
24 did in the deposition. And it's so simple to look at a trend
25 line that just connect the dots. That's all this is, is

1 connecting the dots.

2 THE COURT: I've heard both of you. Go ahead.

3 MR. JOHNSON: Your Honor, just one small thing. Just,
4 I can't stand when he says Mr. Leveridge didn't object.

5 On page 96 --

6 MR. BERNICK: That's not --

7 MR. JOHNSON: -- of the transcript that you have in
8 that package of materials, in the deposition of this witness,
9 starting at line 17, he objected to the entire question which
10 was the statement that these prices represent the price being
11 paid for TDI by Hickory Springs. He gives a long answer there
12 as to why.

13 That is not accurate. He specifically mentions a
14 letter that we sent to Dow about this issue and why it wasn't
15 accurate.

16 And did he allow the questioning to go forward?

17 Yes, he allowed the questioning to go forward, but he
18 objected to the characterization of this information and the
19 use of this information. And we had sent them a long letter
20 about it. So they can't stand here and say that we didn't
21 object and that we didn't tell them what our position was years
22 and years ago.

23 And so when they came in with these things again as
24 exhibits in the pretrial, we again objected and that's in the
25 Pretrial Order. They didn't bring it to our attention again,

1 and here we are the day before the testimony and suddenly they
2 have turned these into summary charts. That's the facts.

3 MR. BERNICK: Your Honor, if you take a look at the
4 end of Mr. Leveridge's statement, Mr. Loeb on behalf of Dow
5 says: Okay, I appreciate that. That's a much better way of
6 expressing it. Thank you, Rick.

7 All the questions that then proceed -- and we put
8 before the Court -- are questions that were put by Mr. Loeb,
9 Exhibit 8444. They're all -- there are pages. The witness is
10 then examined with respect to this chart. The witness is able
11 to answer all of these questions. And Mr. Leveridge does not
12 object to particular questions, but there's no continuing
13 objection at any point. And the whole deposition then goes
14 forward --

15 THE COURT: If he made the objection on page 96, does
16 he have to continue to object throughout the examination?

17 MR. BERNICK: No.

18 THE COURT: Okay.

19 MR. BERNICK: That's not the point. He's objecting to
20 the question that -- he's objecting to the questions Mr. Loeb
21 put on page 96. He then makes the statement, and Mr. Loeb
22 says: "I appreciate that. That's a much better way of
23 expressing it."

24 THE COURT: All right.

25 MR. BERNICK: It's not an objection to all these

1 questions. This is a --

2 MR. JOHNSON: I --

3 MR. BERNICK: Excuse me, excuse me.

4 This is a 30(b)(6) deposition. He's produced as a
5 corporate witness. This whole thing was prepared so that the
6 corporate witness could be asked these questions, and they now
7 want to say now, no, it's no good.

8 THE COURT: Well, they've been saying that right
9 through the pretrial conference, et cetera.

10 MR. BERNICK: No, they didn't say it in the
11 deposition, your Honor, they just made an objection like they
12 objected to hundreds of other documents.

13 THE COURT: Did they or did they not object during the
14 pretrial conference?

15 MR. BERNICK: They objected to the underlying
16 materials in the pretrial conference, that's correct. And they
17 can maintain the objection. If your Honor wants to keep out
18 the summaries on the basis -- those summaries on the basis of
19 the objection --

20 THE COURT: You're talking about the graphs?

21 MR. BERNICK: No. The underlying documents are the
22 summary.

23 THE COURT: All the other --

24 MR. BERNICK: Yes. If your Honor is striking those or
25 saying that they're not admissible on the basis of the Pretrial

1 Order, we'll have to live with that. I think that that would
2 be unfortunate. All that the graph does is it takes the
3 numbers.

4 THE COURT: I know.

5 MR. BERNICK: I can do it myself on a board. I could
6 tomorrow morning in the examination take the time to
7 walk-through with this witness what happened to these prices on
8 the board, and I'll draw the same line.

9 The only -- the only result of this exercise is that
10 we're going to have to have the jury see nine different pages,
11 focus on nine different prices, 20 different prices instead of
12 having a line that's drawn that includes those prices. That
13 makes no sense.

14 THE COURT: Okay. I'll see you in the morning.

15 MR. JOHNSON: I -- I can just read his objection, it's
16 not just to the question, it's to the charts.

17 THE COURT: I'm see you in the morning. Okay. We'll
18 see you then.

19 Mr. Leveridge will be here in the morning. Correct?

20 MR. JOHNSON: Yes, he will, your Honor.

21 THE COURT: How are things going with Judge Pisano?

22 MR. JOHNSON: We sent some more transcripts over
23 yesterday. I guess they're getting prepared to be sent to
24 Judge Pisano.

25 THE COURT: Okay.

1 MR. JOHNSON: I think we're making progress. I'll let
2 Mr. Streeter say if he thinks otherwise.

3 MR. STREETER: We've got more to do. We're waiting
4 for materials from them.

5 THE COURT: However you proceed. You know what the
6 time frames are. So, okay, I know he's going to stop by
7 tomorrow I think to give us an update or to explain how he
8 wants to proceed further I guess.

9 Okay. We'll see you in the morning.

10 (At 2:18 p.m., an adjournment is taken to Thursday,
11 March 17, 26, at 9:00 a.m.)

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